



Senate Fiscal Agency  
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## BILL ANALYSIS



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Senate Bills 207 and 434 (as enacted)  
Sponsor: Senator Rick Jones (S.B. 207)  
Senator Tom Casperson (S.B. 434)  
Senate Committee: Judiciary  
House Committee: Judiciary

**PUBLIC ACTS 242 & 243 of 2016**

Date Completed: 8-5-16

**RATIONALE**

The Michigan Vehicle Code prohibits the operation of a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles by a person who is under the influence of, or is visibly impaired by, the consumption of alcohol, a controlled substance, or other intoxicating substance, or a combination of those substances. The Code also prohibits a person from operating a vehicle if he or she has in his or her body any amount of a Schedule 1 controlled substance or cocaine. (Schedule 1 includes substances that are considered to have a high potential for abuse and no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision.) Although Michigan law authorizes law enforcement officers to administer a preliminary chemical breath analysis to determine the presence and level of alcohol in a person's body, and provides for the admissibility of the results of that analysis in criminal and administrative proceedings, there has been no statutory authorization to administer and rely on a roadside preliminary test to detect the presence of a controlled substance in a driver's system. It was suggested that the Michigan Department of State Police be authorized to implement a roadside preliminary drug testing pilot program in a limited number of counties, and that the results of the tests be admissible in certain criminal prosecutions and administrative hearings.

**CONTENT****Senate Bill 434 amends the Michigan Vehicle Code to do the following:**

- Authorize the Michigan Department of State Police (MSP), subject to appropriation, to establish a one-year pilot program in five counties for roadside drug testing.
- Require the MSP to develop a written policy for the implementation of the pilot program and the administration of roadside drug testing.
- Allow the MSP to promulgate rules to implement the pilot program.
- Require the MSP to report on the pilot program to certain committees of the Legislature within 90 days after the pilot program concludes.
- Allow the MSP, subject to appropriation, to establish additional pilot programs in other counties for up to one year.

**Senate Bills 207 amends the Michigan Vehicle Code to do the following:**

- Authorize a peace officer who is certified as a drug recognition expert in a county participating in the pilot program authorized under Senate Bill 434 to require a person to submit to a preliminary oral fluid analysis under certain conditions.
- Authorize an officer to arrest a person based on the results of a preliminary oral fluid analysis; and make those results admissible in a criminal prosecution and/or an administrative hearing.

- **Require an officer to use the results of an oral fluid analysis to determine whether to order a commercial motor vehicle (CMV) driver out of service, and require an officer to order out of service a CMV driver who refuses to submit to a preliminary oral fluid analysis.**
- **Provide that a person who refuses to submit to a preliminary oral fluid analysis is responsible for a civil infraction.**
- **Specify that a person who is qualified in the administration of standardized field sobriety tests must be allowed to testify.**

The bills will take effect on September 22, 2016. The provisions enacted by Senate Bill 434 are named the "Barbara J. and Thomas J. Swift Law".

#### **Senate Bill 434**

The bill authorizes the MSP to establish a one-year pilot program in five counties for roadside drug testing to determine whether an individual is operating a vehicle while under the influence of a controlled substance. The funding of the pilot program is subject to appropriation.

The MSP must select five counties in which to implement the pilot program. A county is eligible to participate in the pilot program if it has a law enforcement agency within its boundary, including a State Police post, a sheriff's department, or a municipal police department, that employs at least one law enforcement officer who is a certified drug recognition expert. The MSP must develop a written policy for the implementation of the pilot program and the administration of roadside drug testing. The MSP may promulgate rules to implement the pilot program.

Within 90 days after the program's conclusion, the MSP must submit a report to the committees of the Senate and House of Representatives with primary responsibility for judicial and criminal justice issues. The report must cover all of the following:

- How pilot program participant counties were selected.
- The different types of law enforcement agencies in the pilot program participant counties that engaged in roadside drug testing.
- Relevant statistical data, including the number of traffic stops resulting in an arrest for operating under the influence of a controlled substance as a result of roadside drug testing by a certified drug recognition expert and the number and types of convictions resulting from arrests based on the results of those tests.

Upon the conclusion of the initial pilot program and subject to appropriation, the MSP may establish additional pilot programs in other eligible counties for up to one year.

#### **Senate Bill 207**

The bill authorizes a peace officer who is certified as a drug recognition expert in a county participating in the pilot program established under Senate Bill 434 to require a person to submit to a preliminary oral fluid analysis, if the officer has reasonable cause to believe that the person was operating a vehicle and that he or she, by the consumption of a controlled substance, may have affected his or her ability to operate a vehicle or if the officer has reasonable cause to believe that the person had in his or her body any amount of a Schedule 1 controlled substance or cocaine.

The officer may arrest the person based in whole or in part upon the results of a preliminary oral fluid analysis. Results of the analysis are admissible in a criminal prosecution for various violations of operating a motor vehicle while under the influence of, or while impaired by, alcohol or drugs. The results also are admissible in an administrative hearing for one or more of the following purposes:

- To assist the court or hearing officer in determining a challenge to the validity of an arrest.
- As evidence of the presence, or lack of presence, of a controlled substance in the defendant's oral fluid, if offered by the defendant to rebut testimony elicited on cross-examination of a

defense witness that a preliminary analysis showed the presence of a controlled substance that later was not found when a subsequent chemical test of blood or urine was administered.

- As evidence of the presence, or lack of presence, of a controlled substance in the defendant's oral fluid, if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that a preliminary analysis showed no presence of a controlled substance that later was found to be present upon a subsequent chemical test of blood or urine.

A person who submits to a preliminary oral fluid analysis remains subject to other requirements of drunk or impaired driving laws for the purposes of chemical tests. A person who refuses to submit to a preliminary oral fluid analysis upon a peace officer's lawful request is responsible for a civil infraction.

A peace officer who is certified as a drug recognition expert in a county participating in the roadside drug testing pilot program under Senate Bill 434 must use the result of a preliminary oral fluid analysis to determine whether to order a person out of service under Section 319d of the Vehicle Code. (Section 319d prohibits a person from operating a commercial motor vehicle while having an alcohol content of .015 gram or more per 100 milliliters of blood, 210 liters of breath, or 67 milliliters of urine. It also requires a peace officer to order a person out-of-service for 24 hours if the officer has reasonable cause to believe that the person was operating a CMV while having that level of alcohol content based on a preliminary chemical breath analysis or a chemical test of blood or urine, or if the person was operating a CMV and refuses to submit to a preliminary chemical breath analysis or a chemical test.)

An officer certified as a drug recognition expert in a participating county must order out of service a person who was operating a CMV and who refuses to submit to a preliminary oral fluid analysis. This requirement does not limit the officer's use of other competent evidence to determine whether to order a person out of service under Section 319d.

A person who operates a commercial motor vehicle and who is requested to submit to a preliminary oral fluid analysis must be advised that refusing the request is a civil infraction and will result in the issuance of a 24-hour out-of-service order.

In addition, the bill specifies that a person who is qualified by knowledge, skill, experience, training, or education in the administration of standardized field sobriety tests, including the horizontal gaze nystagmus (HGN) test, must be allowed to testify subject to a showing of a proper foundation of qualifications. This provision does not preclude the admissibility of a nonstandardized field sobriety test if it complies with the Michigan Rules of Evidence.

MCL 257.62a et al. (S.B. 207)  
257.43b & 257.625t (S.B. 434)

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

For many years, law enforcement officers have used breathalyzers to conduct roadside preliminary chemical breath analyses when they suspect someone of operating a vehicle while under the influence of, or while impaired by, alcohol. The results of those tests are admissible in criminal and administrative proceedings that can result in criminal penalties and/or license sanctions against a drunk driver. The Michigan Vehicle Code also prohibits a person from driving while under the influence of, or while impaired by, a controlled substance, or with any amount of a Schedule 1 controlled substance or cocaine in his or her system, but there has not been statutory authorization for a roadside preliminary test to determine bodily content of controlled substances. Police officers must either obtain a driver's consent or secure a warrant to have blood drawn in order to determine whether drugs are present in the driver's system. This can take considerable time and resources, and the results may not accurately reflect the vehicle operator's condition at the time he or she was stopped by police. An oral fluid analysis, on the other hand, can be preformed on the scene

and apparently can detect recent use of various drugs, such as marihuana, opiates, and amphetamines, from just a sample of a driver's saliva.

By authorizing the MSP to establish a one-year, five-county pilot program implementing roadside drug testing through an oral fluid analysis, and a subsequent one-year pilot program in additional counties, the bills give law enforcement an opportunity to assess the usefulness and effectiveness of preliminary roadside drug testing of motor vehicle operators. The bills also will ensure proper enforcement of drugged driving laws by authorizing police officers to require a driver suspected of drugged driving to submit to an oral fluid analysis, making refusal to submit a civil infraction, authorizing police to arrest a driver based on the results of the analysis, and making the results of oral fluid analyses admissible in criminal and administrative proceedings. The MSP reportedly are in the process of establishing the pilot program for roadside drug testing, and only an officer with training in detecting roadside impairment will administer an oral fluid analysis.

### **Supporting Argument**

A fatal crash occurred in the Upper Peninsula in 2013, when a truck driver with marihuana in his system killed Barbara and Thomas Swift. Reportedly, 86 other fatalities occurred that year due to drivers with marihuana in their systems. Although the presence of drugs in the truck driver's body was determined through a blood draw, and he was prosecuted and punished for the offense, the ready availability of roadside testing to detect drugs in a driver's system should improve the efficiency and efficacy of the enforcement of drugged driving laws. Lives may be saved if drug-impaired drivers are stopped and removed from the road before causing more tragedies.

### **Opposing Argument**

An analysis of the presence of certain drugs in a driver's system likely will not provide an accurate measure of the amount of a drug's active ingredient that is present, how long it has been present, or whether its presence has impaired the driver's ability to operate a motor vehicle. While a breathalyzer can give a reading of the concentration of alcohol in the body, a saliva test for drugs merely detects the presence of the drug. Different drugs may linger in a person's system for a longer duration than others, and different people may retain a residual presence of a drug for different amounts of time. Certain drugs may be detected in bodily content for days or even weeks after they were used, and the mere presence of the drugs may not affect the person's ability to operate a vehicle.

According to the National Highway Traffic Safety Administration's (NHTSA's) drug and human performance fact sheet on cannabis/marijuana, "It is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects." (THC refers to the active component in cannabis.) The NHTSA fact sheet also states, "It is inadvisable to try and predict effects based on blood THC concentrations alone...". In addition, a recent evaluation of data from drivers arrested for driving under the influence of cannabis conducted by the AAA Foundation for Traffic Study concluded that all of the THC concentration levels examined would have misclassified a substantial number of drivers as impaired, when they did not demonstrate impairment. It also suggests that a substantial number of drivers would be classified as unimpaired, when they actually were impaired.

Although Michigan law prohibits a person from operating a vehicle if he or she has *any* amount of a Schedule 1 controlled substance (including marihuana) in his or her system--which is what a saliva test can indicate--the pilot program authorized by the bills is supposed to use roadside drug testing to determine whether a person is *under the influence* of a controlled substance.

**Response:** The results of the pilot program will facilitate an analysis of the effectiveness of such testing.

### **Opposing Argument**

A recent editorial in *The Detroit News* opposing the bills suggests that they are "too vague to be properly or fairly administered" and calls them "the kind of legislation that sounds beneficial, but threatens privacy and due process rights" ("Editorial: Pot testing program absurd", *The Detroit News*, 6-15-16). The bills do not address what is to be done with the test samples, which will carry sensitive personal information and genetic materials, after an oral fluid analysis is administered.

Also, the pilot program arguably will cost the State much more, in terms of time and money, than it will be worth. Reportedly, each saliva test will cost roughly \$30 and take at least 20 to 30 minutes to administer. This will unnecessarily tie up police officers who could be doing other important work.

### **Opposing Argument**

The MSP should not have blanket authority to expand the pilot program to an unlimited number of counties after the conclusion of the initial five-county pilot program. Expansion should occur only upon further authorization by the Legislature, after it receives and evaluates the MSP's report on the initial pilot program.

**Response:** The MSP may not establish additional pilot programs without an appropriation.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The one-year, five-county roadside pilot drug testing program may cost local and State law enforcement agencies combined a total of between \$20,000 and \$30,000. Under the pilot program, law enforcement officers may call certain law enforcement personnel who are specially trained as drug recognition experts (of whom there are 84 located statewide working for various law enforcement jurisdictions) to a roadside stop situation where a driver is suspected of being under the influence of a controlled substance -- just as they currently do -- but, under the pilot program, according to the MSP, the drug recognition expert will be equipped with a swab-based drug detection kit designed to identify the presence of six different controlled substances within saliva.

A major cost of the pilot project will be the purchase of the swab-based drug detection kits, which can range individually in price from \$250 to \$700. Neither the kit manufacturers nor the five counties that will be part of the pilot program have been identified, but if the counties chosen have a total of 30 drug recognition experts, a supply of kits costing \$20,000 or more may be required. The MSP will bear additional costs to provide a report to the Legislature on the pilot program's results and to create policies and rules. A placeholder appropriation of \$100 for a "roadside saliva testing pilot project" is included in the FY 2016-17 budget act for the Department of State Police (Article XVI of Public Act 268 of 2016). Whether additional funds will be added to this appropriation line, either through legislative transfer or supplemental appropriation, is not known at this time.

It is not clear whether the provisions of the bills will result in increased convictions. An increase in misdemeanor and felony arrests may place incremental resource demands on local court systems, law enforcement, and jails. For any new felony conviction that results in the offender being sent to prison, in the short term, the marginal cost to State government is approximately \$3,764 per additional prisoner per year. In the long term, the marginal cost to State government would be approximately \$34,550 per additional prisoner per year. Any associated increase in fine revenue is dedicated to public libraries.

Fiscal Analyst: Bruce Baker  
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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.